IN RE BRYANT EAGLE TIMBER SALE

IBLA 95-406 Decided June 30, 1995

Appeal from a decision of the Klamath Falls Resource Area Manager, Bureau of Land Management, denying a protest and request for a stay of the Bryant Eagle Timber Sale. ORO 14-TS5-1.

Decision affirmed; request for stay denied as moot.

1. National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

   The provisions of 40 CFR 1506.1 which prohibit any actions which would adversely affect the environment prior to the issuance of a Record of Decision in connection with a required programmatic impact statement do not apply where the proposed action is covered by an existing program statement.

APPEARANCES: Wendell Wood, South Central Field Representative for the Oregon Natural Resources Council, for appellant; A. Barron Bail, Klamath Falls Resource Area Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Oregon Natural Resources Council (ONRC) has appealed from a decision of the Klamath Falls Resource Area (KFRA) Manager, Bureau of Land Management (BLM), dated April 14, 1995, denying a protest against the proposed Bryant Eagle Timber Sale (ORO 14-TS5-1). The Area Manager denied appellant's protest based primarily on environmental assessment (EA) No. OR 014-94-12, which had been prepared for the purpose of examining proposed Bryant/Stukel Salvage, Thinning and Bald Eagle Enhancement Timber Sales, and had been finalized in April 1994. On April 28, 1994, the Acting Area Manager identified Alternative A of the EA as the proposed action alternative and sought public comment thereon. On that same date, the Acting Area Manager entered a finding of no significant impact determination that implementation of Alternative A with the project design features would not constitute a major Federal action having a significant impact on the human environment.

In brief, the EA noted that an extended drought combined with substantial overstocking of many areas had contributed to increased timber mortality and an overall decline in forest health and had also increased the fire hazard to dangerous levels in certain areas (EA at 7). Accordingly, it was proposed to harvest a portion of dead, dying, and high risk trees to

increase overall forest vitality. An additional objective of the proposal was to modify certain stands to enhance bald eagle habitat. Id. The EA envisioned that a number of timber sales might eventually result.

Alternative A of the EA involved the ultimate harvesting of up to 6 million board feet (MMbf) of timber under a selection cut which would harvest identified trees of all ages and size classes except trees 30 inches diameter breast height (DBH) and greater. It was noted that the primary goal of this alternative was "to improve the health of the old growth and reserve trees, particularly trees suitable for eagle nest and roost trees, while maintaining an all-aged stand structure" (EA at 25 (emphasis in original)).

On May 17, 1994, appellant submitted its comments criticizing the proposed EA. On February 28, 1995, the Area Manager signed a Decision Record determining to implement Alternative A of the EA as proposed, commencing with the Bryant Eagle Timber Sale, which involved a partial cut of seven units containing 288 acres of land, with an estimated volume of 266 Mbf of timber designated for harvesting. See Sales Prospectus at 1. He noted in his decision that the EA was consistent with the Lost River Management Framework Plan (MFP), the proposed Resource Management Plan (RMP), and the Bureau-wide Programmatic Timber Management Program Environmental Impact Statement (EIS). On March 13, 1995, appellant formally protested the timber sale.

The protest which appellant filed consisted of 21 pages covering a myriad of objections to the proposal. On April 14, 1995, BLM denied appellant's protest in a 24-page decision, providing a point by point rebuttal to the arguments presented in the protest, noting that 4,664 trees had been marked for harvest of which none were larger than 25 inches DBH and only 69 trees were greater than 20 inches DBH (Decision at 5). Specific justifications were documented for marking each tree over 20 inches DBH (Decision at 8). The decision concluded by noting that the Area Manager had decided to proceed with the proposed sale and that, pursuant to the provisions of 43 CFR 5003.3(f), the decision would not be stayed during the pendency of any appeal. Appellant thereupon pursued an appeal to this Board and also filed a motion seeking to have this Board stay the decision during the Board's consideration of the appeal.

We have reviewed the issues raised by appellant and have concluded that the decision below should be affirmed. Initially, we note that virtually every issue raised on appeal was considered in BLM's April 14 decision and appellant's objections were rejected therein. Many of the criticisms which appellant levels at the sale involve judgmental evaluations of the consequences of the proposed action, with appellant arguing that the timber sale will have detrimental effects on a host of environmental values while BLM contends that the consequences foreseen by appellant will not transpire. While we do not doubt the sincerity of appellant's views, a party challenging a BLM decision to proceed with a

timber sale must do more than allege that some adverse effects will result from the action. It is an unfortunate reality that every timber sale necessarily results in some adverse impacts. To succeed in a challenge to a proposed timber sale, a party must show that the adverse effects likely to occur are of sufficient magnitude so as to render the decision to conduct the timber harvest contrary to applicable laws and regulations. See In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983). We have reviewed appellant's assertions in light of BLM's responses and find ourselves satisfied that BLM has adequately considered the likely environmental consequences of this sale and that its determination to proceed with the proposal can clearly be justified on the record before us.

Rather than merely reiterate the lengthy and detailed responses which BLM has provided to appellant's contentions, we will focus our comments herein to a single issue which threads its way through much of appellant's submissions, viz., that BLM should forestall taking any action until completion of the Eastside EIS presently under joint preparation by BLM and the United States Forest Service in connection with the Eastside Ecosystem Management Project.

[1] In brief, appellant argues that the fact that BLM and the Forest Service are in the process of preparing an EIS for the purpose of adopting a coordinated management strategy for the Eastside Forests together with the fact that BLM also has under consideration the KFRA Proposed RMP/Final Environmental Impact Statement (FEIS), represents an acknowledgement by
BLM that its present environmental studies are inadequate. Therefore, appellant argues, any decision to harvest timber is violative of 40 CFR 1506.1(a).

The Council on Environmental Quality (CEQ) regulation upon which appellant purports to rely, 40 CFR 1506.1(a), provides, in relevant part: "Until an agency issues a record of decision [ROD] as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choices of reasonable alternatives." BLM argues that, under appellant's theory, "all activity under an existing resource management plan would cease whenever the BLM embarks on a planning process to update its plan," and notes that "since the BLM is engaged in almost continual monitoring and plan revision, such a theory would mean that BLM's plans would almost never be implemented" (Decision at 3). Pointing to paragraph (c) of the regulation, BLM contends that the thrust of the CEQ regulation is to prevent actions during the preparation of a programmatic EIS only where there is no existing program statement. Thus, BLM concludes "BLM may continue to manage the lands and resources under the existing program statement while analyses are underway." Under the facts of this case, we agree.

Paragraph (c) of 40 CFR 1506.1 clearly contemplates that the prohibition against actions which may adversely affect the environment prior to the issuance of a ROD in connection with a required programmatic impact statement does not apply where the proposed action is covered by an existing program statement. Thus, that paragraph provides:

> While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action
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> (1) Is justified independently of the program;
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> (2) Is itself accompanied by an adequate environmental impact statement; and
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> (3) Will not prejudice the ultimate decision on the program. [Emphasis supplied.]

It is difficult to fairly read this subsection in its entirety without concluding that the prohibition on adverse actions during the preparation of a program EIS, which this subsection provides, is only applicable where there is no existing EIS which would support the planned action. Indeed, were it otherwise, this provision would penalize those agencies which seek to update their EIS' to keep them current and might provide Government officials with an incentive to discount all new environmental evidence rather than attempt to timely evaluate such information with an eye toward its impact upon ongoing operations.

This is not to say that the mere existence of an approved EIS insulates BLM from challenges that its environmental documentation is out-of-date. Certainly situations can occur in which the changed circumstances that provide the impetus for supplementing an existing EIS are, themselves, sufficient to invalidate particular actions under the existing EIS. Thus, in In re Upper Floras Timber Sale, 86 IBLA 296 (1985), an increase in the level of clearcutting activities substantially beyond that examined in the original programmatic EIS was held to bar the offering of additional acreage for clearcutting in the absence of the approval of either a new EIS or a supplemental EIS examining the effects of increased clearcutting. As we noted:

> [A]s the variance between the proposed plan and the actual program increases in magnitude, a point must be reached where the plan being implemented can no longer be fairly said to encompass the same plan described in the EIS. When this situation develops, it is incumbent upon the decision-makers to prepare an

> entirely new EIS which adequately describes the plan actually being implemented or, alternatively, to issue a supplemental EIS which addresses those elements of the original program which have changed since promulgation of the EIS.

Id. at 299.

There is, however, no assertion herein that the proposed Bryant Eagle Timber Sale violates either the existing Lost River MFP or the Programmatic Timber Management Program EIS. Nor, in point of fact, does appellant challenge BLM's contention that the proposed sale is also consistent with the proposed KFRA RMP/FEIS. Rather, appellant merely argues that the fact that environmental studies are ongoing bars any action until such studies are finalized. As BLM correctly points out, however, the acquisition of knowledge is a continuing process and appellant's theory would effectively prevent BLM from ever taking any action which might impact the environment. Not only have we noted in the past that there is no structural bias in the National Environmental Policy Act of 1969 (NEPA) in favor of the "no action" alternative (see, e.g., Uintah Mountain Club, 116 IBLA 269, 271 (1991); Hoosier Environmental Council, 109 IBLA 160, 173 (1989)), selection of the "no action" alternative (which would be effectively required under appellant's theory) may, itself, involve the acceptance of adverse environmental consequences as, indeed, the EA in the present case indicated. See EA at 45-46.

The purpose of the NEPA process is not to provide a bar to actions which impact the environment; it is to ensure that the decision-makers
are fully apprised of the likely impacts that various alternative courses of action might produce so that their selection from the alternatives represents an informed choice. As we pointed out in Oregon Natural Desert Association, 125 IBLA 52, 60 (1993),

> [t]he role of resource managers is often to select from among numerous incompatible options that alternative which they believe is most beneficial to the greatest number of people, knowing full well that, whatever option is selected, many will dispute their choice. So long as the consequences of the various options are fairly analyzed, this Board must give considerable deference to the ultimate policy selections of the resource managers.

We have examined the record herein and, while we recognize that there is clearly room for a difference of opinion as to the correctness of the choice which BLM has opted for, we believe both that requirements of the law have been observed and that the decision of BLM to proceed with the proposed timber sale can clearly be supported on the basis of the record before us. Therefore, the appeal brought by ONRC is properly denied. In light of this disposition, appellant's motion to stay the effect of the decision is denied as moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge